**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **GARELD DEAN INSLEE** | ) | |
| Claimant | ) | |
| | ) | |
| VS. | ) | |
| | ) | |
| **DUKE DRILLING COMPANY, INC.** | ) | |
| Respondent | ) | Docket No. 1,007,799 |
| | ) | |
| AND | ) | |
| | ) | |
| **WESTPORT INSURANCE CORP.** | ) | |
| Insurance Carrier | ) | |

## ORDER

Respondent requested review of the October 5, 2004 Award entered by Administrative Law Judge (ALJ) John D. Clark. The Appeals Board (Board) heard oral argument on January 18, 2005.

### APPEARANCES

Paul L. Dugan, Jr. of Wichita, Kansas, appeared for claimant. Vincent L. Burnett of Wichita, Kansas, appeared for respondent and its insurance carrier.

### RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

### ISSUES

The ALJ found claimant suffered a work-related accident on July 14, 2002 arising out of and in the course of his employment. Based on a post-accident wage earning ability

of $300 per week and a pre-injury average weekly wage of $537.60 the ALJ determined claimant had a 44 percent wage loss. This was averaged with a 56 percent task loss and the ALJ concluded that claimant was entitled to a 50 percent work disability.

Respondent contends that claimant's award should be limited to his five (5) percent functional impairment as claimant had been in an accommodated job with respondent and was terminated and, therefore, failed to make a good faith effort to retain appropriate employment. Respondent argues because of claimant's bad faith in voluntarily abandoning his accommodated employment he should be limited to his functional impairment and denied work disability.

Claimant argues he should be entitled to an award of permanent partial disability benefits based upon a work disability. Claimant contends that he has a fifty-five (55) percent task loss utilizing Jerry Hardin's task list and applying Dr. Stein's work restrictions. As for a wage loss, claimant argues he should be entitled to an award of permanent partial disability benefits based upon his actual post injury earnings, including a 100 percent wage loss for those periods when he was unemployed and looking for work.

The nature and extent of claimant's disability is the only issue before the Board.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board finds that the ALJ's award should be affirmed.

Claimant was hired by respondent initially as a backup hand in approximately January or February 2000. Claimant worked for respondent on several occasions. Claimant was laid off and not working between March and June 2002. However, he did receive unemployment insurance. During that time claimant was still considered an employee, just on layoff status. He returned to work for respondent in July of 2002 and had worked two weeks before the injury occurred.

Claimant described the process for recalling workers from layoff as an informal one. Claimant testified each driller had the right to hire his own hands. When a rig would start up, if workers heard about it, they would go talk to the driller and see if he needed hands. If needed, they would report to the job site.

In July 2002, claimant was working as a chain hand. That position required making sure you had water, checking motors, taking care of the tongs, the floor, getting up pipe and working the floor. Claimant described that when he was tripping pipe, carrying mud or painting and scrubbing, he would have to lift up to 100 pounds on a regular basis.

On July 14, 2002, at approximately 4:00 or 5:00 a.m. one of the pumps lost pressure. The derrick hand determined there was a washed head in the pump. The driller shut the pump down, and picked up the pipe. The derrick hand and backup hand proceeded to tear the pump apart. Claimant was told to get the new pump rod out of a pump box that was about three feet deep. The pump rod weighed 200 pounds and was on the pump. Claimant explained there is a parts box on the pump, much like a tool box, only bigger. Claimant could not bend over and pick it straight up, so he had to manipulate one end up, pull it up over the side, and use the box to get it where he could lift it up. Claimant proceeded to carry it three steps over, set it on the pump and prepped it for installation. When the derrick hand and backup hand were ready for it, claimant had to pick it back up and hand the pump to them. When claimant handed it to them, he was in an awkward position. He had one foot higher than the other, trying to get over a mud line. At that time he felt a twinge on his left side down by his groin. Claimant testified he did not think much of it at the time. They put the pump back together, and claimant washed it off. The driller ordered claimant to pick the old pump rod up, take it around to the pipe baskets and take the washed out head off of it. Claimant testified after the initial pain he did not feel any pain in the left groin area while completing the last task of washing out the head of the old pump. Claimant worked until the end of his shift.

Claimant did not immediately report the injury to his supervisor because at that time he did not realize he was injured. Claimant testified it is common practice for the driller to take home all the hands at the end of their shift. Claimant was dropped off at home and went in, got undressed and went to bed. At the time claimant went to bed he still did not feel any significant pain. However, about two (2) hours later when claimant went to roll over in bed he experienced severe pain from his left testicle up to his chest and all the way around to his spine, front and back, on his left side.[1] Claimant did not go back to sleep but instead called the driller, Larry Belding, who was sleeping, and left a message on his answering machine. Mr. Belding's wife did call claimant back to ascertain what was wrong with claimant. Eventually, the driller called claimant back as well and claimant told Mr. Belding he was having pain in those areas and would not be able to work as he could hardly move or walk.

Claimant filled out a workers compensation form and completed the urinalysis kit and gave it to Mr. Belding. That Sunday, claimant told Mr. Belding he needed to see a doctor. Mr. Belding did not direct claimant to anyone for medical treatment. The following Monday, claimant called the Rural Health Clinic and got in to see his family physician, F.G. Freeman, M.D. Claimant was seen for the first time by Dr. Freeman on July 16, 2002. Claimant testified he was never directed by respondent to a company physician for treatment.[2] Dr. Freeman treated claimant with medication, scheduled claimant for physical

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[1] R.H. Trans. at 14 (June 21, 2004).

[2] *Id.*at 18.

therapy and gave him a note excusing him from work. Dr. Freeman also referred claimant to Xavier F. Ng, M.D. On September 26, 2002, Dr. Ng released claimant back to work with restrictions, of light duty work and a twenty (20) pound lifting limit. Claimant returned to work for respondent doing light duty work such as pulling weeds and picking up trash. Claimant testified that after an hour of light duty work he would have a lot of pain and swelling in his back and groin area.[3] Claimant believed the swelling and pain was brought about because some of the trash was too heavy to be picked up with a stick and therefore required him instead to bend over and pick it up. Claimant was not able to work a full workday but was only able to work four (4) hours out of the day.

Claimant reported this pain to the respondent and was told, "[i]f you didn't feel like coming in, don't worry about it."[4] Respondent did not change claimant's work duties nor did they send him to a doctor due to the increased pain he experienced. Claimant did not report to work everyday as it would take a day for him to recuperate from the pain. Also, working only four-hours or less per day was not worth making the drive from his home in Pratt, to respondent's job site in Great Bend. Claimant never reported to anyone that he was not coming in to work nor was he instructed to report when he could not come into work. After a conversation with a supervisor for respondent claimant's understanding was to do what he could do and that was good enough. As claimant was only paid mileage one way and because of the problems it caused him physically, he did not consider it feasible to continue working. Eventually, claimant stopped coming to work altogether. Claimant testified respondent did not call him to find out why he was not coming in nor was he ever given notice of termination. Claimant believed he was still employed by respondent. Claimant continued with his medical treatment and was eventually referred by Dr. Freeman to Paul Stein, M.D.

Claimant presented to Dr. Stein for the first time on February 4, 2003. Dr. Stein is a board-certified neurologist. After reviewing claimant's medical records and history, Dr. Stein performed a physical examination. He diagnosed claimant as having degenerative disc disease. Dr. Stein ordered epidural injections. However, claimant said the injections did not help. Dr. Stein changed claimant's restrictions to limit his lifting to 50 pounds with no repetitive bending or twisting. Claimant was not contacted by respondent to perform work within Dr. Stein's restrictions. Claimant was released on September 29, 2003, from Dr. Stein's care and given a prescription for pain medications. Dr. Stein testified that although he did not form an opinion with regard to causation per se his reasonable assumption was, given claimant's history, claimant's chronic back strain and aggravation of his degenerative disc disease occurred at work. Dr. Stein opined that according to the *Guides*[5] claimant was in lumbosacral-related diagnosis Category II which carries a five (5)

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[3] *Id.* at 22.

[4] *Id.* at 23.

[5] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

percent whole person impairment. Dr. Stein also concurred with Dr. Mills' previous restrictions of fifty (50) pounds occasionally, 35 pounds more often and no repetitive bending and twisting. Claimant would be capable of lifting up to fifty (50) pounds occasionally, twenty-five (25) pounds frequently and ten (10) pounds constantly. Dr. Stein referred claimant back to his primary care physician for further medical treatment.

Thereafter, claimant returned to his primary care physician, Dr. Freeman, on October 3, 2003, and June 15, 2004, for ongoing medical treatment. Claimant testified at the June 21, 2004 regular hearing that he continues to have pain in his lower back and occasionally it works around to his left testicle. "Sitting on a tractor, the bouncing, walking on uneven ground, mowing a yard, weed eating"[6] will aggravate the pain.

Claimant found other employment and started work as a farm hand for Paul Bryan on June 26, 2003 until October 2003[7] earning $7.50 per hour. However, this was only seasonal work. Claimant helped Mr. Bryan farm by driving a tractor. This job requires only occasional lifting of a gallon of oil. Claimant testified that driving a tractor does require long periods of sitting however the job does allow him to get up and move around.

After claimant stopped working for Mr. Bryan in October 2003 he starting work running a cotton stripper and performing maintenance and fueling on equipment, from November 14, 2003 until January 28, 2004, the end of cotton season, for Broken Box Custom Harvesting, out of San Angelo, Texas. Claimant's starting wages were $7.50 per hour and when he ended employment his wages were $8.00 per hour. Claimant was allowed to work within his restrictions for Broken Box Custom Harvesting. In June 2004 claimant returned to working for Mr. Bryan at $7.50 an hour. Weather permitting, he usually worked more than an eight (8) hour day.[8] However, he was not paid overtime. It was his understanding that because the work is considered an agricultural pursuit it is not required to pay overtime.

At the request of claimant's attorney, claimant was interviewed on March 17, 2004, by Jerry Hardin a vocational expert for the purpose of developing a job task list based on a 15-year work history. Two physicians testified as to the number of tasks that claimant could no longer perform from his list of pre-injury employment. Dr. Stein reviewed a task list prepared by Jerry Hardin that contained 59 non-duplicative tasks. It was his opinion that claimant could no longer perform 33 of those 59 tasks giving claimant a task loss of 56 percent. Philip R. Mills gave the opinion that claimant had lost the ability to perform 29 percent of the pre-injury tasks, however, the ALJ determined that Dr. Mills had "waffled" on several of the tasks listed as to whether or not claimant would be able to perform. The

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[6] R. H. Trans. at 35 (June 21, 2004).

[7] *Id.* at 36.

[8] *Id.* at 39.

ALJ adopted the opinions of Dr. Stein as more persuasive and found that claimant had lost the ability to perform 56 percent of the tasks he performed in substantial gainful employment prior to work-related injuries that are subject to this litigation. Despite not making any specific finding as to whether or not claimant made a good faith effort to find appropriate employment post-injury, the ALJ imputed a post-injury average wage loss of forty-four (44) percent. By averaging the wage loss of 44 percent with the task loss of 56 percent, the ALJ found claimant has a 50 percent permanent partial general disability.

When an injury does not fit within the schedules of K.S.A. 1999 Supp. 44-510d; permanent partial general disability is determined by the formula set forth in K.S.A. 1999 Supp. 44-510e, which provides in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the scheduled in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

But that statute must be read in light of *Foulk*[9] and *Copeland*.[10] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing an accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-501e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages

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[9] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[10] *Copeland v. Johnson Group, Inc.,* 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

rather than actual earnings when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

> If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[11]

The Kansas Court of Appeals in *Watson*[12] reiterated that the absence of a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Rather, in such circumstances the post-injury wage for the permanent partial general disability formula should be based upon all the evidence, including expert testimony concerning the worker's ability to earn wages.

Respondent contends that claimant should be denied an award based on work disability and that his permanent partial disability award should be limited to his percentage of functional impairment. The Board disagrees. The Kansas appellate courts have consistently held that workers who return to work following a work injury are not deprived of a work disability if they later lose their job due to their injury.[13] In *Lee*,[14] the Kansas Court of Appeals first held that a worker who returned to work following an injury earning a wage comparable to his pre-injury wage was entitled to receive a work disability after losing his job in a layoff. The Court of Appeals, after reviewing the history of the permanent partial general disability formula, stated in *Lee* that it was clear under the present version of the formula that the worker would not be entitled to a work disability as long as he worked for the employer, but once he stopped earning a comparable wage he could receive a work disability, subject to his ability to prove it. In its syllabus, the Court stated:

> 1. The 1993 amendments to K.S.A. 1992 Supp. 44-510e(a) are merely the latest in a series of attempts by the legislature to ensure that a worker does not earn substantial post-injury wages while collecting work disability benefits. Thus, the 1992 version of the statute may be interpreted in light of the 1993 amendments.
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> 2. The 1993 version of K.S.A. 44-510e(a) eliminates the presumption of no work disability set out in K.S.A. 1992 Supp. 44-510e(a). Instead, it prevents permanent partial disability compensation in excess of functional impairment as long as the employee earns 90 percent of his or her pre-injury wage.

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[11] *Id.* at 320.

[12] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

[13] *Tharp v. Eaton Corp.*, 23 Kan. App. 2d 895, 940 P.2d 66 (1997); *Guerrero v. Dold Foods, Inc.*, 22 Kan. App. 2d 53, 913 P.2d 612 (1995).

[14] *Lee v. Boing Co.,* 21 Kan. App. 2d 365, 899 P.2d 516 (1995).

> 3. It is not the intent of the legislature to deprive an employee of work disability benefits after a high-paying employer discharges him or her as part of an economic layoff where the employer was accommodating the injured employee at a higher wage than the employee could earn elsewhere.

Finally, in January 2003 the Kansas Court of Appeals in *Cavender*[15] held that a worker who had obtained employment following a work injury was entitled to receive work disability benefits despite the fact that she resigned her employment for reasons unrelated to the injury. The Court reasoned that the proper test to apply in these cases is whether the worker has made a good faith effort to find appropriate employment. The Court wrote, in part:

> K.S.A. 44-510e(a) allows work disability in excess of functional impairment only if the claimant is making less than 90% of his or her preinjury gross weekly wage. If this percentage is met, K.S.A. 44-510e(a) provides the equation for computing work disability [.]
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> . . . .
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> The cases interpreting K.S.A. 44-510e have added the requirement that an employee must set forth a good faith effort to secure appropriate employment before work disability will be awarded.
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> The good faith of an employee's efforts to find or retain appropriate employment is determined on a case-by-case basis. . . .[16]
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> . . . .
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> The purpose of the good faith test, at its very core, is to prevent employees from taking advantage of the workers compensation system. In situations where post injury workers leave future employment, the good faith test is extended to determine whether leaving was reasonable. Clearly, in the cases cited by PIP, leaving employment was reasonable when the employment became outside physical restrictions or the changed circumstances justified a refusal of accommodated employment. However, the reasonableness of leaving employment is not limited to a decision based on work restrictions or injuries.
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> The present case is closest in nature, while still not on point, to those cases where an injured employee is terminated due to economic downturn and layoff and the employee is found to still be entitled to work disability. Those cases present a

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[15] *Cavender v. PIP Printing, Inc.*, 31 Kan. App. 2d 127, 61 P.3d 101 (2003); *See also Palmer v. Lindberg Heat Treating*, 31 Kan. App. 2d 1, 59 P.3d 352 (2002).

[16] *Id.* at 103-104 (citation omitted).

> situation where termination or leaving employment is unrelated to the workers compensation injury or restrictions. . . .[17]

According to the above appellate court decisions, in determining permanent partial general disability, the question is whether the worker had made a good faith effort to find and retain appropriate employment. If the worker has made a good faith effort, then the actual difference in pre- and post-injury earnings is used in the permanent partial general disability formula. If the worker has not made a good faith effort, then a post-injury wage should be imputed. Consequently, workers who are earning less than 90 percent of their pre-injury wage and have acted in good faith are entitled to receive an award for work disability.

The ALJ determined the claimant's permanent partial general disability should not be limited to his functional impairment rating. Instead, the ALJ awarded a work disability. The ALJ determined claimant's injury was the reason for him losing his job with respondent. Eventually, claimant did find jobs that were within his restrictions and that he could perform. However, those jobs were seasonal and the record does not adequately explain claimant's subsequent job search efforts. The ALJ imputed a wage to claimant based on his ability to earn wages post-injury. Although not specifically stated, the obvious implication was that claimant had not made an ongoing good faith effort to obtain employment post-injury. The Board agrees. Accordingly, a post injury wage should be imputed based on claimant's earning capacity for those periods when claimant was not gainfully employed.

Moreover, the Board finds that claimant's injury and restrictions not only contributed to his unemployment but that injury has permanently limited his employment opportunities. Furthermore, the injury was the reason claimant was unable to perform the job with respondent. Claimant has established good faith in his inability to continue with respondent. However, he has failed to prove a consistent and ongoing good faith effort to find appropriate employment. Therefore, an imputed wage should be used for the work disability formula. The Board agrees with, and affirms that the ALJ's finding that claimant retains the ability to earn $300 per week post-injury. The Board likewise agrees with and affirms the other findings, conclusions and orders contained in the Award.

The Board recognizes that because claimant's employment changed and his income fluctuated after his accident that there would be a corresponding change in the percentage of actual wage loss. And this would likewise affect the percentage of work disability to which claimant was entitled.

But due to the accelerated pay out formula and because the compensation rate does not change, it makes no difference in the calculation of this award or in the amount

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[17] *Id.* at 105 (citation omitted).

due. Therefore, this award simply uses the final percentage of work disability to compute the total number of weeks of permanent partial disability compensation. As the ALJ used claimant's final wages to calculate wage loss, this results in the ALJ's Award being affirmed.

## AWARD

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated October 5, 2004, is affirmed.

**IT IS SO ORDERED.**

Dated this _____ day of May, 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Paul V. Dugan, Jr., Attorney for Claimant
Vincent A. Burnett, Attorney for Respondent and Westport Insurance Corp.
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director